TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1957~~ 1958

No. ~~910~~ 46

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, ET AL., PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 9, 1958
CERTIORARI GRANTED MAY 19, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 910

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, ET AL., PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Respondents.

APPENDIX "B" TO BRIEF OF PETITIONER—
Filed September 7, 1957

[fol. 2]

IN THE TAX COURT OF THE UNITED STATES

Docket No. 55694

JAMES E. PEURIFOY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET ENTRIES

1954

Dec. 23—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 27—Copy of petition served on General Counsel.

1955

Feb. 1—Answer filed by General Counsel.

Feb. 1—Request for hearing in Greensboro filed by General Counsel.

Feb. 4—Notice issued placing proceeding on Greensboro calendar. Service of answer and request made.

Aug. 23—Hearing set December 5, 1955, Winston-Salem.

Oct. 31—Notice changing hearing place to Greensboro, N. C., Dec. 5, 1955.

Nov. 7—Motion to consolidate with dockets 56074 and 56262 filed by petitioner. 11/8/55, granted.

Dec. 7, 8—Hearing had before Judge Atkins on merits. Record held open 30 days to receive a further stipulation of the parties. Stipulation of Facts filed. Briefs, 2/6/56; replies, 3/7/56.

Dec. 22—Transcript of Hearing 12/7/55 filed.

Dec. 22—Transcript of Hearing 12/7/55 filed.

[fol. 3]

1956

Mar. 2—Motion for extension of time to May 8, 1956 to file brief and to June 7, 1956 to file reply brief filed by petitioner.

Mar. 5—Above motion is granted.

May 8—Brief filed by petitioner. Copy served 5/29/56.

May 8—Motion for extension of time to 6/7/56 to file brief filed by respondent. 5/9/56, granted.

May 25—Brief filed by respondent. Copy served 5/29/56.

Jul. 9—Reply brief filed by petitioner. 7/9/56, served.

Oct. 31—Findings of fact and opinion filed. Atkins J. Decision will be entered under Rule 50. Served 11/1/56.

1957

Jan. 3—Agreed computation filed.

Jan. 8—Decision entered, Judge Pierce, Div. 2. Served 1/8/57.

Apr. 5—Petition for review by U. S. Court of Appeals, Fourth Circuit, filed by respondent.

1957

Apr. 5—Notice of filing petition for review sent to Daniel R. Dixon, Esq., filed.

Apr. 9—Proof of service of petition for review filed. (Counsel)

Apr. 17—Notice of filing petition for review with proof of service thereon filed. (James E. Peurifoy)

May 7—Motion for extension of time for filing record on review and docketing petition for review to July 3, 1957 filed by respondent.

[fol. 4]

May 8—Order extending time for filing record on review and docketing petition for review to July 3, 1957, entered. Served 5/10/57.

Jun. 13—Statement of Points with proof of service thereon filed.

Jun. 13—Designation of Contents of Record on Review with proof of service thereon filed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 56074

PAUL V. STINES and BETTY O. STINES, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET ENTRIES

1955

Jan. 24—Petition received and filed. Taxpayer notified. Fee paid.

Jan. 26—Copy of petition served on General Counsel.

1955

Mar. 25—Answer filed by General Counsel.

Mar. 25—Request for Hearing in Greensboro, N. C. filed by General Counsel.

Mar. 30—Notice issued placing proceeding on Greensboro calendar. Service of answer and request made.

Aug. 23—Hearing set December 5, 1956, Winston-Salem, N. C.

Sep. 30—Motion for leave to file amended petition, amended petition lodged, filed by taxpayer. 9/30/55, granted.

Oct. 3—Copy of motion and amended petition served on General Counsel.

Oct. 17—Answer to amended petition filed by respondent.

[fol. 5]

Oct. 31—Notice changing place of hearing to Greensboro, N. C., Dec. 5, 1955.

Nov. 7—Motion to consolidate with dockets 55694 and 56262 filed by petitioner. 11/8/55, granted.

Dec. 7, 8—Hearing had before Judge Atkins on merits. Record to be held open 30 days to receive further stipulation by parties. Stipulation of Facts filed. Briefs, Feb. 6, 1956; replies, Mar. 7, 1956.

Dec. 22—Transcript of Hearing 12/7/55 filed.

Dec. 22—Transcript of Hearing 12/8/55 filed.

1956

Mar. 2—Motion for extension of time to May 8, 1956 to file brief and to June 7, 1956 to file reply brief, filed by petitioner, 3/5/56, granted.

May 8—Motion for extension of time to 6/7/56 to file brief filed by respondent. 5/9/56, granted.

May 8—Brief filed by petitioner. Copy served 5/29/56.

1956

May 25—Brief filed by respondent. Copy served 5/29/56.

Jul. 9—Reply brief filed by petitioner. 7/9/56, served.

Oct. 31—Findings of Fact and Opinion filed. Atkins J. Decision will be entered under Rule 50. Served 11/1/56.

Jan. 3—Agreed Computation filed.

Jan. 8—Decision entered, Judge Pierce, Div. 2. Served 1/8/57.

[fol. 6]

Apr. 5—Petition for review by U. S. Court of Appeals, Fourth Circuit, filed by respondent.

Apr. 5—Notice of filing petition for review sent to Daniel R. Dixon, Esq. filed.

Apr. 9—Proof of service of petition for review filed. (Counsel)

Apr. 17—Notice of filing petition for review with proof of service thereon, to Paul V. Stines and Betty O. Stines, filed.

May 7—Motion for extension of time for filing record on review and docketing petition for review to July 3, 1957, filed by respondent.

May 8—Order extending time to July 3, 1957 to file record and docket petition for review entered. Served 5/10/57.

Jun. 13—Statement of Points with proof of service thereon filed.

Jun. 13—Designation of Contents of Record on review with proof of service thereon filed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 56262

JOHN S. HALL and DORIS D. HALL, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET ENTRIES

1955

Feb. 9—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 9—Copy of petition served on General Counsel.

Apr. 5—Answer filed by General Counsel.

Apr. 5—Request for Hearing in Greensboro, N. C. filed by General Counsel.

[fol. 7]

Apr. 7—Notice issued placing proceeding on Greensboro, N. C. calendar. Service of answer and request made.

Aug. 23—Hearing set Dec. 5, 1955, Winston-Salem, N. C.

Oct. 31—Notice changing place of hearing to Greensboro, N. C., Dec. 5, 1955.

Nov. 7—Motion to consolidate with dockets 55694 and 56074 filed by petitioner. 11/8/55, granted.

Dec. 7, 8—Hearing had before Judge Atkins on merits. Record held open 30 days to receive further stipulation of the parties. Stipulation of Facts filed. Briefs, 2/6/56; replies, 3/7/56.

Dec. 22—Transcript of Hearing 12/7/55 filed.

Dec. 22—Transcript of Hearing 12/8/55 filed.

1956

Mar. 2—Motion for extension of time to May 8, 1956 to file brief and to June 7, 1956 to file reply brief filed by petitioner.

1956

Mar. 5—Above motion is granted.

May 8—Brief filed by petitioner. Copy served 5/29/56.

May 8—Motion for extension of time to 6/7/56 to file brief filed by respondent. 5/9/56, granted.

May 25—Brief filed by respondent. Copy served 5/29/56.

Jul. 9—Reply brief filed by petitioner. 7/9/56, copy served.

Oct. 31—Findings of fact and opinion filed. Atkins, J. Decision will be entered under Rule 50. Served 11/1/56.

[fol. 8]

1957

Jan. 3—Agreed computation filed.

Jan. 8—Decision entered, Judge Pierce, Div. 2. Served 1/8/57.

Apr. 5—Petition for Review filed by U. S. Court of Appeals, Fourth Circuit, filed by respondent.

Apr. 5—Notice of filing petition for review sent to Daniel R. Dixon, Esq. filed.

Apr. 9—Proof of service of petition for review filed (Counsel.)

Apr. 15—Notice of filing petition for review with proof of service thereon sent to John S. and Doris D. Hall filed.

May 7—Motion for extension of time for filing record on review and docketing petition for review to July 3, 1957, filed by respondent.

May 8—Order extending time to July 3, 1957, to file record on review and docket petition for review entered. Served 5/10/57.

Jun. 13—Statement of Points with proof of service thereon filed.

Jun. 13—Designation of Contents of Record with proof of service thereon filed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 55694

JAMES E. PEURIFOY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-named petitioner, [fol. 9] by their respective undersigned attorneys, that for the purpose of this proceeding only, the following facts shall be taken as true and correct; provided, however, that this stipulation does not waive the right of either party to introduce other or additional evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any of such facts on the grounds of immateriality or irrelevancy.

(1) That petitioner, James E. Peurifoy, is an unmarried individual and was unmarried during the entire year 1953; that for the taxable year 1953 petitioner filed an individual Federal income tax return (Form 1040), a photostat copy of which is attached hereto as joint Exhibit 1-A, with the District Director of Internal Revenue for the District of North Carolina;

(2) That during the entire year of 1953, petitioner maintained a residence at Kure Beach, North Carolina; that said residence was personally constructed by petitioner and is owned by him free and clear of all debt; that he physically resides in said residence at all times he is employed in the vicinity of Wilmington, North Carolina, and returns to said residence on weekends if the place of employment is within a reasonable distance of said residence;

(3) That petitioner is a pipe welder by trade; that he is a member of the trade union known as the United Asso-

ciation of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the Union); that he is a member of Local No. 329 with headquarters of said ~~local~~ in Wilmington, North Carolina;

(4) That petitioner obtains employment through his Union; that his local sends him to job sites by means of [fol. 10] a "referral card"; that this referral card is presented to a "job steward" at the work site who is a Union member; that the job steward then takes him to the job superintendent who represents the employer and by so doing "clears" him as a duly qualified Union member; that he is actually hired by the job superintendent;

(5) That the job superintendent has some discretion in hiring men, in that he can refuse to hire certain persons for cause, but must eventually hire from men "sponsored" by the Union;

(6) There is no paragraph (6).

(7) That petitioner joined the Union on August 13, 1951; that since said date he has been employed as follows:

(a) That he was first employed by The Piping Equipment Company with main offices in Greensboro, North Carolina, to work on a paper mill at Acme, North Carolina; that he worked on this project from on or about August 13, 1951 until on or about March 10, 1952;

(b) That he was next employed by The Grinnell Company of Charlotte, North Carolina, to work on the Dupont plant at Kinston, North Carolina; that he worked on this project from March 10, 1952 until November 20, 1953; that while so employed he roomed and boarded with a Mr. and Mrs. George McArthur and that during the period January 1, 1953 through November 20, 1953 he expended for room and board the sum of $496.00; that the distance from his home in Kure Beach to the boarding house near Kinston, North Carolina, is approximately 122 miles; that it is necessary to go through Wilmington en route to Kinston and that the distance from Kure Beach to Wilmington is [fol. 11] approximately 20 miles; that the distance from

the George McArthur boarding house to the Dupont plant is approximately 1 mile; that he drove his car from his boarding house each work day to the job site and back, and that he drove from his boarding house to his residence in Kure Beach each weekend;

(c) That he was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the Carolina Power and Light Company plant at Mount Misery, North Carolina, situated about 7 miles from Wilmington, North Carolina; that he worked on this project from November 30, 1953 through May 14, 1955; that while he worked on this project he resided in his residence at Kure Beach, North Carolina;

(d) That he was next employed by The A. L. Wright Company of Portsmouth, Virginia, to work on the Marine Base at Cherry Point, North Carolina; that he worked on this project for approximately a 3 month period starting May 16, 1955; that while working on this project he obtained a room in New Bern, North Carolina, and ate his meals in restaurants and went home on weekends by driving his automobile;

(e) That he was next employed by The Piping Equipment Company of Greensboro, North Carolina, to work on a paper mill near Acme, North Carolina; that he worked on this project for about 2 weeks and lived at his residence at Kure Beach while so employed and drove his car back and forth to work each work day;

(f) That he was next employed by Rickwell Manufacturing Company of Barberton, Ohio, to work in their shops located in Barberton, Ohio, and worked on this project approximately 1 week beginning October 3, 1955; that [fol. 12] while so employed he roomed in a rooming house and ate his meals in restaurants.

Daniel R. Dixon, Counsel for Petitioner, 507 Raleigh Building, Raleigh, North Carolina.

John Potts Barnes, Chief Counsel, Internal Revenue Service, Counsel for Respondent.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 56074

PAUL V. STINES and BETTY O. STINES, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-named petitioners, by their respective undersigned attorneys, that for the purpose of this proceeding only, the following facts shall be taken as true and correct; provided, however, that this stipulation does not waive the right of either party to introduce other or additional evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any of such facts on the grounds of immateriality or irrelevancy:

(1) That petitioners, Paul V. Stines and Betty O. Stines, are husband and wife and have one child who is a minor; that for the taxable year 1953 petitioners filed a joint Federal income tax return (Form 1040), a photostat copy of which is attached hereto as Exhibit A, with the District [fol. 13] Director of Internal Revenue for the District of North Carolina;

(2) That during the entire year of 1953, petitioners maintained a residence at 325 Summit Avenue in Raleigh, North Carolina; that petitioners had maintained said residence since sometime in 1952; that said petitioners were owners of this residence in the sense that they were purchasing the residence; that Betty O. Stines and their child physically resided in said residence during the entire year of 1953;

(3) That petitioner, Paul V. Stines (hereinafter referred to as Paul), is a journeyman plumber by trade and is a

member of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the Union); that he is a member of Local 785 with headquarters of said local at Raleigh, North Carolina;

(4) That Paul obtains employment through his Union; that his local sends him to job sites by means of a "referral card"; that this referral card is presented to a "job steward" at the work site who is a Union member; that the job steward then takes him to the job superintendent who represents the employer and by so doing "clears" him as a duly qualified Union member; that he is then actually hired by the job superintendent;

(5) That the job superintendent has some discretion in hiring men, in that he can refuse to hire certain persons for cause, but must eventually hire from men "sponsored" by the Union;

(6) There is no paragraph (6).

(7) That Paul has been a member of said Union since 1947; that since that date he has worked on different projects in the States of Virginia, North Carolina, South Carolina, Georgia and Florida;

[fol. 14] (8) That Paul's employment for the year 1953 was as follows:

(a) That he was employed by the Grinnell Company of Charlotte, North Carolina, to work on the DuPont Plant at Kinston, North Carolina; that he worked on this job from around March 26, 1952 until around April 10, 1953 at which time he left for personal reasons; that while so employed he rented a room with a Mrs. Sweet of Kinston, North Carolina and ate his meals in restaurants; that the distance from Raleigh to Kinston by automobile is approximately 78 miles and the distance from Kinston to the plant site is approximately an additional 8 miles; that he drove his car or rode with others from his residence in Raleigh to his rooming house in Kinston and returned once a week; and that he drove his car or rode with others to and from

the job site each working day; that transportation was arranged on a car pool basis and that he drove his car 1/5 of the time while working on the Kinston project; that he and four other persons constituted the car pool and transportation was provided by each member of the pool in turn; that the cost of operating his car was 7¢ per mile; that he normally worked five days a week but sometimes worked on Saturdays and/or Sundays and that he averaged about five and one-half days a week on this job; that while so employed the rate of pay was 14.8¢ an hour greater than the Union scale.

(b) That Paul was next employed by Carl B. Mims of Raleigh, North Carolina, and worked for said party from around April 13, 1953 to around April 28, 1953 and that such work was performed in and around the environs of Raleigh, North Carolina;

(c) That Paul was next employed by A. L. Wright and Company, Inc. of Portsmouth, Virginia, and worked for said employer from around May 6, 1953 to around June [fol. 15] 23, 1953 until he quit for personal reasons and that work for said employer was performed on the Westinghouse plant in the environs of Raleigh, North Carolina;

(d) That he was next employed by Markowitz Bros., Inc., of Miami, Florida, to work on the air base near Charleston, South Carolina, and that he worked on said air base from around June 23, 1953 to around July 15, 1953; that he went to Charleston, South Carolina, by driving his car; that the distance from Raleigh to Charleston is approximately 300 miles and the distance from his boarding house in Charleston to the plant site is approximately 11 miles; that he worked five days a week normally and drove to the job site in the morning and returned at night; that he occasionally worked on Saturday and that for the period he averaged working five and one-half days a week for this period of employment;

(e) That Paul was next employed by Biemann and Powell of Raleigh, North Carolina, and worked for said employer from August 1, 1953 through December 31, 1953; that while so "employed" he was loaned by his employer

to work for other employers for short periods as hereinafter described;

(f) That while employed by Biemann and Rowell, Paul was loaned to the firm of Garrison and Hopkins Company, Inc., of Charlotte, North Carolina, and while so employed worked on the S. H. Kress Company job in Raleigh, North Carolina, and was also employed by Garrison and Hopkins Company, Inc., at Fort Bragg, North Carolina, for approximately seven and one-half weeks;

(g) That while "employed" by Biemann and Rowell, Paul was loaned to the firm of Cooper and Goodwin (now J. B. Goodwin & Son) of Raleigh, North Carolina, and worked for said Cooper and Goodwin from December 9, 1953 through December 30, 1953; and that such work was [fol. 16] performed in and around the environs of Raleigh, North Carolina;

(9) That during the year 1953 Paul expended for room and board while working at Kinston and Fort Bragg, North Carolina, and Charleston, South Carolina, the sum of $475.13.

Daniel R. Dixon, Counsel for Petitioners, 507 Raleigh Building, Raleigh, North Carolina.

John Potts Barnes, Chief Counsel, Internal Revenue Service, Counsel for Respondent.

In the Tax Court of the United States

Docket No. 56262

John S. Hall and Doris D. Hall, Petitioners,

v.

Commissioner of Internal Revenue, Respondent.

Stipulation of Facts

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-named peti-

tioners, by their respective undersigned attorneys, that for the purpose of this proceeding only, the following facts shall be taken as true and correct; provided, however, that this stipulation does not waive the right of either party to introduce other or additional evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any of such facts on the grounds of immateriality or irrelevancy:

(1) That petitioners, John S. and Doris D. Hall, husband and wife are individuals now residing in Knightsdale, [fol. 17] North Carolina; that petitioners have three children, all of whom are minors;

(2) That for the taxable year 1953 petitioners, John S. Hall and Doris D. Hall, filed separate individual Federal income tax returns, photostat copies of which are attached hereto, respectively, as joint Exhibits 1-A and 2-B;

(3) That during the entire year of 1953, petitioners maintained a residence on Sheffield Road in Raleigh, North Carolina; that petitioners maintained said residence for approximately four years ending in the early part of 1954; that said petitioners were owners of said residence in the sense that they were purchasing the residence; that they sold the residence in the latter part of 1953 but continued to maintain residence there until the early part of 1954; that Doris D. Hall, one of the petitioners herein, and the three children of petitioners physically resided in said residence during the entire year 1953;

(4) That petitioner, John S. Hall (hereinafter referred to as John) is a welder by trade and is a member of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the Union); that he is a member of Local No. 785 of said Union with headquarters of said local in Raleigh, North Carolina;

(5) That John obtains employment through his Union; that his local sends him to job sites by means of a "referral card"; that this referral card is presented to a "job

steward" at the work site who is a Union member; that the job steward then takes him to the job superintendent who represents the employer and by so doing "clears" him as a duly qualified union member; that he is then actually hired by the job superintendent;

[fol. 18] (6) That the job superintendent has some discretion in hiring men, in that he can refuse to hire certain persons for cause, but must eventually hire from men "sponsored" by the Union;

(7) There is no paragraph (7).

(8) That John joined the Union in 1952; that since that time John has been employed as follows:

(a) That he was first employed by the Grinnell Company of Charlotte, North Carolina, to work on the Burlington Mills plant at Neuse, North Carolina; that he worked on this project for a period of approximately one year until it was completed;

(b) That he was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the Dupont plant at Kinston, North Carolina; that he worked on this project from October 21, 1952 through July 10, 1953; and that he resigned for personal reasons; that while working on the Dupont plant at Kinston, North Carolina he roomed with Mrs. Carl Waters of Kinston, North Carolina, and ate his meals out; that while working in Kinston he expended the total amount of $530.13 for room and board during the period January 1, 1953 through July 10, 1953; that the distance from Raleigh, North Carolina to Kinston, North Carolina by automobile is approximately 78 miles and that the distance from Kinston, North Carolina to the Dupont plant site is approximately an additional 8 miles; that John paid a fellow worker $6.50 a week for transportation and that such transportation included travel back and forth to the plant from Kinston each work day and one round trip from Raleigh, North Carolina, to Kinston, North Carolina, on weekends; that while employed on this project the rate of pay was 14.8¢ per hour greater than the Union scale; that he normally worked 5 days a week; that he

sometimes worked on Saturdays and Sundays and that he [fol. 19] averaged about 5½ days a week for this period of employment;

(c) That John was next employed by the A. L. Wright and Company, Inc., of Portsmouth, Virginia, to work on the Westinghouse plant under construction in Raleigh, North Carolina, and that he worked on this project from July 13, 1953 until the project was completed on March 5, 1954;

(d) That John was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the atomic energy plant at Portsmouth, Ohio, and that he worked on this project for approximately three and one-half months, and that he resigned for personal reasons;

(e) That John was next employed by B. F. Shaw at Aiken, South Carolina, to work on the atomic energy plant near Aiken, South Carolina; that he worked on said project for about two weeks and resigned this job for personal reasons;

(f) That John was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the Allied Dye and Chemical Corporation plant at Hopewell, Virginia; that he worked on this project for approximately seven months; that he resigned for personal reasons;

(g) That John was next employed by Singleton, Embry and Reed of Charlotte, North Carolina, to work on the Mayo Knitting Mill plant at Tarboro, North Carolina; that he worked on this project for one month until the work was completed;

(h) That John was next employed by the O. D. Wyatt and Company of Raleigh, North Carolina, to work on the Carolina Power and Light Company plant at Moncure, North Carolina; that he worked on this project for approximately three months until the work ended;

[fol. 20] (i) That John was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the Carolina Power and Light Company plant at Moncure,

North Carolina; that John has worked on this project for approximately three months and that he is working on this project as of the present time.

Daniel R. Dixon, Counsel for Petitioners.

John Potts Barnes, Chief Counsel, Internal Revenue Service, Counsel for Respondent.

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27 T. C. No. 16

IN TAX COURT OF THE UNITED STATES

JAMES E. PEURIFOY, et al.,[1] Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket Nos. 55694, 56074, 56262. Filed October 31, 1956.

Deductions—Traveling Expenses.—*Held*, that the evidence establishes that the employment of the petitioners away from the places of their established residences was temporary in character and that the costs of meals, lodging and transportation constituted deductible traveling expenses while away from home. Sections 22 (n) and 23 (a) (1) (A) of the Internal Revenue Code of 1939.

Daniel R. Dixon, Esq., for the petitioners.

Hubert E. Kelly, Esq., for the respondent.

The respondent determined deficiencies in income tax for the calendar year 1953 as follows:

James E. Peurifoy	$449.88
Paul V. Stines and Betty O. Stines	492.12
John S. Hall and Doris D. Hall	365.06

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[1] Proceedings of the following petitioners are consolidated herewith: Paul V. Stines and Betty O. Stines, Docket No. 56074, and John S. Hall and Doris D. Hall, Docket No. 56262.

[fol. 21] The question presented is whether amounts expended by James E. Peurifoy, Paul V. Stines and John S. Hall, hereinafter referred to as the petitioners, for board and lodging at a job site and for transportation therefrom to their residences after termination of employment are deductible pursuant to sections 22 (n) and 23 (a) (1) (A) of the Internal Revenue Code of 1939, or whether they constitute nondeductible personal expenditures under section 24 (a) (1).

FINDINGS OF FACT—Filed October 31, 1956

In the case of each petitioner some of the facts were stipulated and are found as stipulated, the stipulations being incorporated herein by this reference.

Returns were timely filed by the petitioners for the calendar year 1953 with the district director of internal revenue for the district of North Carolina.

The petitioner James E. Peurifoy is a pipe welder. Since August 13, 1951, he has been a member of Local No. 329, with headquarters in Wilmington, North Carolina, of the trade union known as The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the union). The petitioner Stines is a journeyman plumber and the petitioner Hall is a welder. Since 1947 and 1952, respectively, they have been members of Local No. 785 of the same union, with headquarters at Raleigh, North Carolina. They all obtain employment through their local unions which send them to various work sites where they are then hired by the employer.

Members of local unions are often sent to other jurisdictions for work. In the case of a large project journeymen workers, as distinguished from foremen or superinten- [fol. 22] dents, may be drawn from various states. Where a job requires more skilled craftsmen than a local union has available in the area, the local union will deal with other local unions in the same state or other states in order to procure the necessary workers. If this does not produce sufficient workmen the national union will procure journeymen and apprentices from all over the country. A journey-

man craftsman working on construction projects may have several different employers in the course of a year or even though he may work for one employer throughout a year, he may work at several different job sites. In the building and construction industry, some construction jobs such as the Atomic Energy projects, may run for a period of years, but the general run of jobs is for a period of a few weeks or for a few months.

The petitioner Peurifoy is, and was during the year 1953, an unmarried individual. During the entire year 1953, he owned and maintained a residence at Kure Beach, North Carolina, which is about 20 miles from Wilmington. He actually resides there when he is employed in the vicinity of Wilmington and returns to this residence on week ends if the place of employment is within a reasonable distance. He uses his own automobile for transportation.

He was first employed by The Piping Equipment Company with main offices in Greensboro, North Carolina, to work on a paper mill at Acme, North Carolina. He worked on this project from about August 13, 1951 until about March 10, 1952.

He was next employed by The Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina. He worked on this project from March 10, 1952 until November 20, 1953. While so employed he roomed and boarded near Kinston and from [fol. 23] January 1, 1953 through November 20, 1953, he expended for room and board the sum of $496. The distance from his home in Kure Beach to the duPont plant is approximately 122 miles. The cost to him of driving his automobile from Kinston to Kure Beach after termination of this employment was $8.54.

He was next employed by The Grinnell Company to work on the Carolina Light and Power Company plant at Mount Misery, North Carolina, situated about seven miles from Wilmington. He worked on this project from November 30, 1953, through May 14, 1955, and while he worked on this project he resided in his residence at Kure Beach. Thereafter, in 1955 he worked at Cherry Point, North Carolina, for three months, at Acme, North Carolina, for two weeks, and at Barberton, Ohio, for about one week.

In his return for 1953, he deducted the amount of $1,920.80 from gross income as "Subsistence and temporary quarters necessary for earning income, not reimbursed by employer." The respondent disallowed the entire claimed deduction on the ground that payment thereof had not been proven and that even if paid the expenditure represented personal and living expenses.

The petitioners, Paul V. Stines and Betty O. Stines, are husband and wife. Betty O. Stines appears as a petitioner by virtue of having joined in the filing of the income tax return for 1953. During the entire year 1953 they maintained a residence in Raleigh, North Carolina, and had maintained such residence since sometime in 1952. Betty O. Stines and the petitioners' minor child actually resided in such residence during the entire year 1953.

Since 1947, when he became a member of the union, the petitioner Paul V. Stines has had about 30 jobs ranging [fol. 24] in duration from two weeks to over a year. He worked for one employer for over two years but on different jobs in different locations. He was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina, from March 26, 1952 until about April 10, 1953, when he was discharged. While so employed, he rented a room at Kinston, North Carolina, and ate his meals in restaurants. During 1953 he expended $262.50 for room and board. The distance from Raleigh to Kinston by automobile is approximately 78 miles and the distance from Kinston to the plant site is approximately an additional eight miles. He drove his car or rode with others from his residence in Raleigh to his rooming house in Kinston and return once a week. The cost to him, under his car pool arrangement, for transportation from Kinston to Raleigh upon termination of his work in Kinston was $1.09. While employed at Kinston he received 14.8 cents per hour greater than the normal union scale in accordance with the agreement between the Grinnell Company and the union. All union employees received this additional amount regardless of where they were living. This extra amount was intended to compensate the employees for time expended in going from the town of Kinston to the job site and return.

He was next employed by Carl B. Mims of Raleigh from about April 13, 1953 to about April 28, 1953, to work in and around the environs of Raleigh.

He then worked for A. L. Wright and Company, Inc. of Portsmouth, Virginia, from about May 6, 1953 to about June 23, 1953, when he quit for personal reasons. This work was performed on the Westinghouse plant near Raleigh.

His next employment was with Markovitz Bros., Inc. of Miami, Florida, to work on an air base near Charleston, [fol. 25] South Carolina. He worked there from about June 23, 1953 to about July 15, 1953. He went to Charleston by driving his car. The distance from Raleigh to Charleston is approximately 300 miles and the distance from his boarding house in Charleston to the plant site is approximately 11 miles. While at Charleston the petitioner expended $57 for room and board. The expenses incurred for driving his car from Raleigh to Charleston and return was $42.

He was next employed by Biemann and Rowell of Raleigh, North Carolina, from August 1, 1953 through December 31, 1953. While so employed he was loaned by his employer to Garrison and Hopkins Company, Inc., of Charlotte, North Carolina, to work on the S. H. Kress Company job in Raleigh, and to Cooper and Goodwin of Raleigh to work from December 9, 1953 through December 30, 1953 in and around the environs of Raleigh. He also worked for Garrison and Hopkins Company, Inc., at Fort Bragg, North Carolina, for approximately seven and one-half weeks during 1953. While there he expended $155.63 for room and board. The distance from Raleigh to Fort Bragg is approximately 50 miles. The cost of his transportation for the round trip to Fort Bragg was approximately $7.

In their return for the year 1953, the petitioners, Paul V. and Betty O. Stines, deducted the amount of $2,480 from gross income for "Subsistence and quarter [sic] non reimbursable by employer necessary to earning income." The respondent disallowed the deduction for the same reasons as in the case of the petitioner Peurifoy.

The petitioners, John S. Hall and Doris D. Hall, are husband and wife. They have three minor children. During the entire year 1953 they maintained a residence in Raleigh, North Carolina. They maintained such residence [fol. 26] for approximately four years ending in the early part of 1954. Doris D. Hall and the three children actually resided there during the entire year 1953.

The petitioner John S. Hall was first employed in 1952 by the Grinnell Company of Charlotte, North Carolina, to work on the Burlington Mills plant at Neuse, North Carolina, and worked on this project until it was completed in that year.

He was next employed by the Grinnell Company to work on the duPont plant at Kinston, North Carolina, and worked on this project from October 21, 1952 through July 10, 1953. He resigned for personal reasons. While working on the duPont plant at Kinston, he expended $530.13 for room and board during the period January 1, 1953 through July 10, 1953. During this time he returned to Raleigh on weekends. The cost to him of his transportation from Kinston to Raleigh after termination of his employment was $2.01. While he was employed on this project he received 14.8 cents per hour greater than the normal union scale, as explained hereinabove.

He was next employed by A. L. Wright and Company, Inc., of Portsmouth, Virginia, to work on the Westinghouse plant under construction in Raleigh. He worked on this project from July 13, 1953 until the project was completed on March 5, 1954.

Thereafter, in 1954 and 1955, he worked at Portsmouth, Ohio, for about three and one-half months, at Aiken, South Carolina, for about two weeks, at Hopewell, Virginia, for about seven months, at Tarboro, North Carolina, for one month, and at Moncure, North Carolina, on two successive jobs of three months each.

The petitioners, John S. Hall and Doris D. Hall, filed separate individual income tax returns for the year 1953. [fol. 27] In his return for 1953 the petitioner John S. Hall deducted from gross income the amount of $1,556.60 for the same reasons as in the case of the bursable by employer necessary to earning income." The respondent disallowed

the claimed deduction of $1,556.60 for the same reasons as in the case of the other petitioners herein. Although the petitioner and his wife filed separate returns for 1953 the respondent, in his notice of deficiency, gave the petitioner the benefit of joint filing by including in the notice of deficiency an adjustment for salary income earned by Doris D. Hall in the amount of $270.54. No error has been assigned regarding this adjustment.

The employment of the petitioners at the duPont plant at Kinston was temporary and the expenses incurred by them for food and lodging while there and for transportation therefrom to their residences upon termination of such employment were incurred while away from their homes in the pursuit of their trade.

OPINION—Filed October 31, 1956

ATKINS, *Judge*: The question presented is whether the expenses incurred by the petitioners for meals and lodging while engaged in work at the duPont plant at Kinston, and the cost of returning therefrom, upon termination of their employment, to the places of their residence, constitute allowable deductions under the provisions of sections 22 (n) and 23 (a) (1) (A) of the Internal Revenue Code of 1939,[2] or whether they are nondeductible personal, living

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[2] SEC. 22 (n) Definition of "Adjusted Gross Income."—As used in this chapter the term "adjusted gross income" means the gross income minus—

(1) Trade and Business Deductions.—The deductions allowed by section 23 which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee;

(2) Expenses of Travel and Lodging in Connection with Employment.—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses—

(1) Trade or Business Expenses.—

(A) In General.—* * * traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

[fol. 28] or family expenses within the meaning of section 24 (a) (1).[3]

There remains no controversy as to the amounts of any of the expenditures. The stipulation fixes some of the amounts and the parties on brief agree as to others. The amounts of expenditures which we have set forth in our Findings of Fact are limited to the amounts now claimed by the petitioners on brief, they having therein waived any claim of deductibility of certain expenditures.

Ordinarily the cost of meals and lodging is personal and therefore not deductible in arriving at net income. Congress has specifically provided in section 24 (a) (1) that personal, living or family expenses are not deductible. And commuting expenses to and from work have always been treated as nondeductible. *Frank H. Sullivan*, 1 B. T. A. [fol. 29] 993. Thus, it has been held that if a taxpayer chooses for reasons personal to him to maintain his residence at a place other than the place of his employment, his personal or living expenses at the place of employment do not lose their character as nondeductible personal expenditures. *Commissioner* v. *Flowers*, 326 U. S. 465. See also *Barnhill* v. *Commissioner* (C. A. 4), 148 F. 2d 913; *Ford* v. *Commissioner* (C. A. 4), 227 F. 2d 297; and *Andrews* v. *Commissioner* (C. A. 4), 179 F. 2d 502, each affirming a decision of this Court.

In the *Flowers* case, *supra*, the Supreme Court stated that "business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of the business rather than the personal conveniences and necessities of the traveler must be the motivating factors." The Supreme Court there also stated that whether particular expenditures fulfill the conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. In the *Barnhill* case, *supra*, the Court stated:

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[3] SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) General Rule.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x); • • •

> It is clear in the first place that Congress, in prescribing the rules for the computation of net income, intended to confine the deductions for business expenses to those which are ordinary and necessary, and to prohibit the deduction of personal living or family expenses. It was recognized that the taxpayer must maintain a home for his family at his own expense even when he is absent on business, and that his personal expenses during his absence on business may fairly be regarded as expenses of the business. But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, for [fol. 30] his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business. * * *

As we view the situation here, we do not have the case of a taxpayer who for personal reasons, as distinguished from the requirements of his business, maintains his residence at a place other than that of his actual employment. Each of the petitioners before us is a construction worker and each maintained a residence at a particular place, Peurifoy at Kure Beach, near Wilmington, North Carolina, and Stines and Hall at Raleigh, North Carolina. Each of them belonged to a local union at or near the place of his residence and each obtained employment through that union. The stipulated facts show that throughout a number of years, including the taxable year before us, they have worked at various job sites both at or near their residences and at distant points, sometimes in other states, for varying periods of time. There was no particular place where any one of them principally had employment, although each of them at times worked at or near the place where he maintained his residence. The record indicates that each was accustomed to return to the place of his residence upon the completion of a job. Impelling reasons for the accept-

ance of employment away from the place of residence readily come to mind, such as the availability of work, the current pay scale, or working conditions.

In this situation we are of the opinion that when any of the petitioners accepted temporary employment away from the places of their residence, they reasonably could not have been expected to establish a residence at the places [fol. 31] of employment. In those instances the expenses incurred at the place of employment are considered as being due to the exigencies of the trade or business. That was the situation in *Harry F. Schurer*, 3 T. C. 544, and *E. G. Leach*, 12 T. C. 20, in which we held the traveling expenses to be deductible. The respondent recognizes that this is the proper view and concedes that the employment of the petitioner Paul V. Stines at Charleston, South Carolina, for about 3 weeks and at Fort Bragg, North Carolina, for about 7½ weeks was temporary and that expenses incurred by him in traveling to those places to accept employment and returning to Raleigh and the cost of board and lodging while at those places are deductible.

On the other hand, he contends that the expenses incurred by each of the petitioners in connection with employment at the duPont plant at Kinston, North Carolina, are not deductible. He argues that that job was not temporary, but was of indefinite or indeterminate duration, relying principally upon the length of time the petitioners were employed there, Peurifoy for about 20½ months, Paul V. Stines for about 12½ months, and John S. Hall for about 8½ months, portions of which periods fell within the taxable year. He relies upon the line of cases in which the position has been taken that if the employment is of indefinite duration, the additional living costs and the transportation costs incurred because of failure to bring together the place of residence and the place of employment are deemed to have been occasioned by reasons of personal choice or convenience, resulting in the nondeductibility of the expenses. See *Willard S. Jones*, 13 T. C. 880; *Beatrice H. Albert*, 13 T. C. 129; *Commissioner* v. *Andrews*, *supra*; and *Ford* v. *Commissioner*, *supra*.

[fol. 32] The principal factor upon which those cases turned was the nature of the employment. In the *Albert*

case we said that the employment "was not the sort of employment in which termination within a short period could be foreseen, as was the situation in *Harry F. Schurer*, 3 T. C. 544, and *E. G. Leach*, 12 T. C. 20." In the *Jones* case the taxpayer was required to work for his employer until released and he could not obtain other work without a release. In the *Andrews* case the employment was "for the duration of the war" and was characterized by the court as being "of indefinite tenure." In the *Ford* case the taxpayer had a regular and continuing employment with one employer over a number of years as subforeman and later as piping superintendent.

The petitioners argue that any employment upon a construction project is temporary in that by its very nature it is terminable, and that hence any expense in connection therewith should be considered as deductible business expense. We think it obvious that such a flat rule cannot be adopted. Each case must be decided upon the basis of its own facts and circumstances, including those relating to the known or contemplated duration of the work, the taxpayer's intent with regard to the maintenance or establishment of business headquarters, and any facts that develop during the course of the employment. Employment which may appear to be temporary in character at the start may ripen into employment of indefinite duration. See *Arnold P. Bark*, 6 T. C. 851. Furthermore, employment may be of such relatively long actual duration as to indicate, in the absence of evidence to the contrary, that the employment was either indefinite at the start or developed into indefinite employment.

[fol. 33] Upon the record in the instant cases, we think that the employment at Kinston was of the same general nature as that involved in the *Schurer* and *Leach* cases, *supra*. The petitioner Hall testified that when they entered upon a job at a particular site, including the Kinston job, they were not guaranteed the job for any specified time and did not know how long they would be employed there, although there was usually some hearsay information as to the duration of the work. Thus, as to all three of the petitioners, there was no reason for them to believe that the nature of the job would be any different from that of

other jobs which formed the general pattern of their employment. Each of the petitioners did, upon termination of his work at Kinston, return to the place of his residence and take employment there. On these facts the employment in question is properly to be considered as temporary in nature. In such a situation it would not be reasonable to expect them to shift their residences to the place of employment or to regard Kinston as their "home" for tax purposes.

We conclude that the cost of board and lodging of each of the petitioners at Kinston and the cost of their transportation from Kinston to Raleigh and Kure Beach, respectively, upon termination of this particular employment constitute traveling expenses incurred while away from home in the pursuit of his trade within the intendment of section 23 (a) (1) (A), and that they are deductible under section 22 (n). See *Carroll B. Mershon*, 17 T. C. 861.

Reviewed by the Court.

Decisions will be entered under Rule 50.

[fol. 34]

IN THE TAX COURT OF THE UNITED STATES, WASHINGTON

Docket No. 55694

JAMES E. PEURIFOY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered January 8, 1957

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed October 31, 1956, the respondent herein, on January 3, 1957, filed a recomputation for entry of decision and the petitioner having noted his acquiescence thereon, it is

Ordered and Decided: That there is an overpayment in income tax for the taxable year 1953 in the amount

of $48.42, all of which was paid within two years before the mailing of the notice of deficiency.

Entered January 8, 1957.

(Signed) Allin H. Pierce, Judge.

In the Tax Court of the United States, Washington

Docket No. 56074

Paul V. Stines and Betty O. Stines, Petitioners,

v.

Commissioner of Internal Revenue, Respondent.

Decision—Entered January 8, 1957

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed October 31, 1956, the respondent herein, on January 3, 1957, filed a recomputation for entry of decision and the petitioners having noted their acquiescence thereon, it is

[fol. 35] Ordered and Decided: That there is an overpayment in income tax for the taxable year 1953 in the amount of $94.58, all of which was paid within two years before the mailing of the notice of deficiency.

Entered January 8, 1957.

(Signed) Allin H. Pierce, Judge.

IN THE TAX COURT OF THE UNITED STATES, WASHINGTON

Docket No. 56262

JOHN S. HALL and DORIS D. HALL, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered January 8, 1957

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed October 31, 1956, the respondent herein, on January 3, 1957, filed a recomputation for entry of decision and the petitioners having noted their acquiescence thereon, it is

Ordered and Decided: That there is an overpayment in income tax for the taxable year 1953 in the amount of $61.80, all of which was paid within two years before the mailing of the notice of deficiency.

Entered January 8, 1957.

(Signed) Allin H. Pierce, Judge.

[fol. 37]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Respondents.

On Petitions to Review the Decisions of The Tax Court of the United States

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DOCKET ENTRIES

June 26, 1957, transcript of record, in duplicate, filed and cause docketed.

June 26, 1957, certified copy of order of May 8, 1957, extending the time to July 3, 1957, for filing the record on review and docketing the petitions for review in this court filed.

June 28, 1957, appearance of Daniel R. Dixon entered for the respondents.

June 28, 1957, appearance of Nelson P. Rose, Chief Counsel, and Vernon F. Weekley, Special Attorney, Internal Revenue Service, entered for the petitioner.

June 29, 1957, appearance of Charles K. Rice, Assistant Attorney General, and John N. Stull, Attorney, Department of Justice, entered for the petitioner.

September 7, 1957, brief and appendices for petitioner filed.

September 7, 1957, appearance of Charles K. Rice, Assistant Attorney General, Lee A. Jackson and Kenneth E.

Levin, Attorneys, Department of Justice, entered for the petitioner.

September 27, 1957, brief for respondents filed.

[fol. 38]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—October 18, 1957 (omitted in printing)

[fol. 39]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Respondents.

On Petitions to Review the Decisions of The Tax Court of the United States

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Argued October 18, 1957

Before SOPER and HAYNSWORTH, Circuit Judges, and THOMPSON, District Judge.

OPINION—Decided November 11, 1957

Kenneth E. Levin, Attorney, Department of Justice, (Charles K. Rice, Assistant Attorney General, and Lee A. Jackson, Attorney, Department of Justice, on brief) for Petitioner, and Daniel R. Dixon for Respondents.

[fol. 40] HAYNSWORTH, Circuit Judge:

We have for review a decision of the Tax Court[1] which held that the Commissioner had improperly assessed deficiencies of income tax to three construction workers. The claimed deficiencies arose upon the disallowance by the Commissioner of living expenses of the three workers while each was employed upon a construction project at Kinston, North Carolina, and of the travel expense of each when, upon the termination of his employment, he returned to his residence.

The taxpayer, Peurifoy, an unmarried individual, maintained a residence at Kure Beach near Wilmington, North Carolina. He resided in this house when employed in the vicinity of Wilmington and, at other times, used it on week ends if the place of his employment was not unreasonably distant.

Peurifoy was first employed as a pipe welder in the construction of a paper mill at Acme, North Carolina. After approximately seven months, he left that employment to work on a new plant for the duPont company under construction near Kinston, North Carolina. He was employed on that project for approximately 20½ months ending November 20, 1953. Thereafter he was employed for approximately 17½ months in the construction of an electric generating plant at Mount Misery, North Carolina, for approximately 3 months in construction work on the Marine Base at Cherry Point, North Carolina, for two weeks on a paper mill project near Acme, North Carolina, and for one week in Barberton, Ohio. The record does not indicate [fol. 41] whether any of these employments were terminated for cause, in consequence of completion of the work or for reasons personal to the taxpayer.

The taxpayer, Stines, is married and, beginning sometime in 1952 maintained a residence for his family in Raleigh, North Carolina. A journeyman plumber, he has had approximately thirty jobs since 1947 ranging in duration from two weeks to more than a year. On March 26, 1952,

[1] *James E. Peurifoy, et al.* v. *Commissioner*, 27 T.C. 149.

he was employed to work on the duPont plant near Kinston and left 12½ months later, on April 10, 1953. It is stipulated that he left this employment for personal reasons.[2]

The taxpayer, Hall, is married and about 1950 acquired a house for his family in Raleigh, North Carolina. He sold this house in the latter part of 1953, but his family continued to reside there until early in 1954. At the time of the stipulation, he was a resident of Knightsdale, North Carolina.

After working for approximately a year in the construction of a textile plant at Neuse, North Carolina, he was employed as a welder in the construction of the duPont plant near Kinston. This employment began October 21, 1952, and ended on July 10, 1953, when he resigned for reasons personal to him. Subsequently, he was employed in the construction of (1) a factory at Raleigh, North Carolina, for 7½ months, (2) an atomic energy plant at Portsmouth, Ohio, for 3½ months, (3) an atomic energy plant near Aiken, South Carolina, for 2 weeks, (4) a chemical plant at Hopewell, Virginia, for 7 weeks, (5) a textile [fol. 42] plant at Tarboro, North Carolina, for 1 month, (6) an electric generation plant at Moncure, North Carolina, for 3 months and (7) the same Moncure plant (for a different contractor) in which work he was engaged at the time of the stipulation. He resigned for personal reasons from his jobs at Portsmouth, Aiken and Hopewell as well as from that at Kinston.

While employed at the duPont plant near Kinston, Peurifoy boarded at a house, approximately 1 mile from the plant site, though he went to Kure Beach on weeks (sic) ends. The boarding house is approximately 122 miles from his house at Kure Beach and approximately 102 miles from Wilmington which he claims as his tax home.

During the period of their employment at the duPont plant, Stines and Hall rented rooms in Kinston, though on

[2] Stines testified that the "personal reason" for his leaving was that he was discharged after walking off the job during working hours to attend to a personal errand.

week ends they went to Raleigh where their families resided. Kinston is approximately 78 miles from Raleigh.

The record does not show when the construction of the duPont plant near Kinston began or when it was completed. Nor does it disclose the period of employment of welders, pipe welders or plumbers, the trades practiced by these taxpayers. It does reveal that Peurifoy and Stines were employed on this project in March 1952. Hall was not employed there until October 1952, but he had been engaged in other employment until then. We are informed that when Stines and Hall quit their jobs at Kinston in April and July 1953, respectively, they did so for personal reasons, not because work for people of their trades was no longer available. The reason for Peurifoy's leaving in November 1953 is not mentioned. It would appear from these facts, however, that it was a construction project of some size and of substantial duration.

[fol. 43] The only testimony bearing upon the duration of the work was that of Hall who testified that on all construction jobs, including that at Kinston, they were not guaranteed a job for any specific period nor were they told by the employer how long the work was expected to last. There was talk among the workers of the probable duration of the work. He did not mention, however, what his, or their, expectation was with respect to the duPont project near Kinston.

The only other circumstance considered by the Tax Court as relevant was the membership of Peurifoy in a union local with headquarters in Wilmington and of Stines and Hall in a union local with headquarters in Raleigh, the fact that each received referrals from his local union and the general preference of each for employment in the vicinity to employment at more distant points. But if subjective considerations of personal preference have any bearing upon the problem, it is difficult to find in these considerations any distinction between the case of the construction worker, who, without the assistance of a local union, seeks and obtains employment preferably in the vicinity of the residence of his family but at other times at more distant

points. It is stipulated that a union referral is not tantamount to employment and that the individual worker must apply to the contractor at the job site for employment. Upon that application, he is employed or not depending upon the needs and preferences of the employer.

Upon these facts, we think the Tax Court was in error in finding that the employment of these taxpayers on the duPont project at Kinston was temporary and in concluding that their maintenance expense while there and the expense of travel at the termination of their employment was [fol. 44] deductible under section 23 (a)(1)(A) of the Internal Revenue Code.[3]

Work in the heavy construction industry, by its very nature, has a degree of impermanence. Employment is usually for each job only and lasts no longer than the need at that project for the particular skill of the individual employee. Upon many of the larger projects, however, such need, and the actual employment of an individual, may last for several, even many, years. Other projects may be of comparatively short duration. It is also a characteristic of the industry, as shown in the stipulations in this case, that upon larger construction projects outside the larger metropolitan centers, the local supply of the necessary skills must be greatly augmented by workers coming from other places. Work in the industry, therefore, is, to some extent, transient as well as impermanent.

Construction workers are not the only ones, however, who find it necessary or profitable to move or seek em-

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[3] "§23. Deductions from gross income. In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) Trade or business expenses.

(A) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *."

ployment from place to place, and the Tax Court, in its opinion in these cases, recognizes that the transient and impermanent aspect of work in heavy construction does not itself distinguish construction work from other employment or hold the answer to our problem. Indeed these character-
[fol. 45] istics of the industry tend to strip from a remote residence elements essential to its status as the sole "tax home."

When a taxpayer accepts employment at a place removed from the residence he maintains for his family, his travel and maintenance expense is not usually deductible under §23(a)(1)(A). *Commissioner* v. *Flowers*, 326 U. S. 465, 66 S.Ct. 250, 90 L.Ed. 203. Indeed under the rule of Commissioner v. Flowers the expense, in order to be deductible, must be "required by the exigencies" of the employer's business, not those of the calling of the employee. "The job, not the taxpayer's pattern of living, must require the travel." *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, 249. That an employee for reasons personal to himself and his family maintains a home at a distance from his business does not serve the business of the employer and ordinarily his travel expense and the expense of his maintenance at either place is not deductible. *Commissioner* v. *Flowers*, supra., *Barnhill* v. *Commissioner*, 4 Cir., 148 F. 2d 913, 159 A.L.R. 1210.

Where, however, an individual, who has a well established tax home, accepts temporary employment of short duration away from his tax home, it has been held that his travel and maintenance are allowable deductions under §23(a)(1)(A) and are not "personal, living or family expenses" within the meaning of §24(a)(1) even though such expenses are not incurred for the benefit of the employer. *Coburn* v. *Commissioner*, 2 Cir., 138 F. 2d 763, *Schurer* v. *Commissioner*, 3 T.C. 544, *Leach* v. *Commissioner*, 12 T.C. 20. If we assume the validity of this exception to the rule of Commissioner v. Flowers as applied to one not self-employed, it is essential that the employment away from the established tax home shall be temporary in contempla-
[fol. 46] tion at the time of its acceptance and not indeterminate in fact as it develops. However justified he may be

from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expense at his post of duty is not an ordinary and necessary business expense within the meaning of §23(a)(1)(A) if the employment is of substantial or indefinite duration. *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S.Ct. 250, 90 L.Ed. 203, *Ford* v. *Commissioner*, 4 Cir., 227 F. 2d 297, *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, *Andrews* v. *Commissioner*, 4 Cir., 179 F. 2d 502; *Ney* v. *United States*, 8 Cir., 171 F. 2d 449; *Bercaw* v. *Commissioner*, 4 Cir., 165 F. 2d 521.

When the taxpayers in these cases went into the Tax Court, carrying the burden of showing that the Commissioner's determination was incorrect, they produced nothing to show that their employment on the duPont project was not of indefinite duration. It is clear that two of them left that employment for personal reasons when work was still available, while the third left after 20½ months for an undisclosed reason. For aught that appears, work might have been available there for all three for much longer than 20½ months. While each of them may have accepted other employment at other times which was temporary, that does not tend to prove that this employment was temporary and not of substantial or indefinite duration. And though subjective consideration of the reasonableness of their moving their residences to their post of duty may have some bearing in determining the applicability of §24 (a)(1), it does not establish the deductibility of maintenance expenses under §23(a)(1)(A). *Bercaw* v. *Commissioner*, supra.; *Warren* v. *Commissioner*, 13 T. C. 205; *Whitaker* v. *Commissioner*, 24 T.C. 750.

[fol. 47] The question of deductibility of such expenses is ordinarily one of fact. When the conclusionary finding that the work was temporary and maintenance expense deductible was clearly erroneous, however, it is our right and duty to reverse it.

Reversed.

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Respondents.

On Petitions to Review the Decisions of The Tax Court of the United States

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JUDGMENT—November 11, 1957

This Cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decisions of the said The Tax Court of the United States, in this cause, be, and the same are hereby, reversed; and that this cause be, and the same is hereby, remanded to The Tax Court of the United States for further proceedings consistent with the opinion of the Court filed herein.

November 11, 1957.

Clement F. Haynsworth, Jr., United States Circuit Judge.

December 12, 1957, mandate issued and transmitted to the Clerk of the Tax Court of the United States.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 51]

IN SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 10, 1958

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 11th, 1958.

/s/ Earl Warren, Chief Justice of the United States.

Dated this 10th day of February, 1958.

[fol. 52]

IN SUPREME COURT OF THE UNITED STATES

No. 910, October Term, 1957

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, et al., Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

ORDER ALLOWING CERTIORARI—May 19, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.
